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NO. 82-659

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1982

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF PUBLIC WELFARE,

Petitioner,

v.

DONALD EUGENE GARDNER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRUCE FOX
ERIC L. FRANK
Counsel for Respondent

Community Legal Services, Inc.
Law Center Northeast
3156 Kensington Avenue
Philadelphia, PA 19134-2483
(215) 427-4850

COUNTER STATEMENT OF THE QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the judgment liens held by petitioner were judicial liens within the meaning of 11 U.S.C. §522(f)(1) of the Bankruptcy Reform Act of 1978?

2. Did the Court of Appeals err in holding that Congress intended, under the Bankruptcy Reform Act, to treat judicial liens held by governmental creditors in the same manner as judicial liens held by nongovernmental creditors?

3. Did the Court of Appeals err in holding that Congress has the power in bankruptcy proceedings to treat judicial liens held by governmental creditors in the same manner as judicial liens held by nongovernmental creditors?

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v.

DONALD EUGENE GARDNER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

SUMMARY OF ARGUMENT

This litigation raises the narrow question of whether petitioner's liens against respondent's real property were properly classified as "judicial liens" and therefore could be avoided under the relevant provisions of the Bankruptcy Code. The Court of Appeals below joined with all the bankruptcy courts in Pennsylvania and found that petitioner's liens, which arose upon the entry of a confessed judgment, were within the statutory definition of judicial

lien. This question has not been decided outside of Pennsylvania and has very limited importance outside of Pennsylvania. Therefore, it is not of sufficient public importance to warrant review by this Court.

The other question posed by this litigation is whether Congress intended to and had the authority to subject a governmental creditor to the lien avoidance provisions of the Bankruptcy Code. The Court of Appeals below decided the issue of intent by carefully examining the statute and its legislative history and reached a conclusion completely consistent with the two other Courts of Appeals decisions which have subjected governmental creditors to Bankruptcy Code provisions. The issue of Congressional authority was decided by reference to the plenary power of Congress to establish uniform bankruptcy laws as well as those decisions of this Court which affirmed the power of Congress to abrogate state immunity in certain circumstances.

Since the decision of the Court of Appeals is in complete accord with the decisions of this Court, in harmony with the decisions of other Circuit Courts of Appeals, and is of limited public importance, the Petition for Certiorari should be denied.

II.

ARGUMENT

A. THE HOLDING THAT PETITIONER POSSESSED JUDICIAL LIENS WITHIN THE MEANING OF THE BANKRUPTCY REFORM ACT IS NOT IN CONFLICT WITH ANY OTHER DECISION NOR IS IT OF SUFFICIENT PUBLIC IMPORTANCE TO WARRANT GRANTING THIS PETITION FOR CERTIORARI

In this case, the Court of Appeals joined every Pennsylvania court which has considered the question in holding that the confessed judgments held by petitioner, Department of Public Welfare ("DPW"), are "judicial liens" within the meaning of section 522(f)(1) of the Bankruptcy Reform Act of 1978 ("Bankruptcy Code"), 11 U.S.C. §522(f)(1). This holding was based upon the statutory definition of "judicial lien" as well as relevant Pennsylvania statutes, regulations, and common law principles which give rise to DPW's liens. This Court should decline DPW's invitation to review this holding for not only it is clearly correct and consistent with the decisions of every other court, but the issue is of very limited public significance beyond Pennsylvania.

Section 522(f)(1) of the Bankruptcy Code provides:

> (f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is —
>
> (1) a judicial lien; ....

This section is one of the new code provisions designed to protect the statutory exemptions offered to each debtor in sections 522(b), (d), as a means of insuring that each debtor receives a "fresh start" after bankruptcy. See H.R. Rep. No. 95-595, 95th Cong. 1st Sess. 118 (1977); In re Giles, 18 B.R. 708 (E.D. Tenn. 1982). Afraid that the statutory exemptions found in the Code might be lost to creditors with overly broad security interests against a debtor's property, Congress provided debtors with the power to avoid a type of security interest, denoted as a "judicial lien," to the extent that this type of lien impaired an exemption of the debtor. See Report of Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, 93rd Cong. 1st Sess., Part I, at 173, 180 (1973); id., Part II at 124, 131 (1973).

The definition of "judicial lien" is found in the Code at 11 U.S.C. §101(27) as a:

> lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.

Since the parties agreed that all but $650.00 of DPW's liens impaired Mr. Gardner's exemptions as set forth in §522(d) of the Code, the question below was whether these liens fell within the statutory definition of judicial lien.

The lien in issue arose from the entry of six confessed judgments against Mr. Gardner in York County, Pennsylvania. As a condition of receiving benefits, Mr. Gardner was required to sign

a reimbursement agreement which contains a confession of judgment agreement. 55 Pa. Code §§257.21(a),(b); 257.23(b); 257.24(b). The Pennsylvania statute upon which this requirement is based does not contain any mention of confessed judgments. Rather, state law authorizes DPW to obtain reimbursement by commencing a lawsuit and obtaining a judgment which "shall be a lien," as are other judgments. Act of June 24, 1973, P.L. 2043, §4, as amended, 62 P.S. §1974. However, to save itself the time and expense of bringing suit, DPW administratively requires every homeowner seeking assistance to sign a reimbursement agreement with a confession of judgment clause.[1/]

Under Pennsylvania law all recorded judgments act as a lien against all real property owned by the judgment debtor at the time of entry of the judgment and in the county in which the judgment is recorded. 42 Pa. C.S.A. §4304. This judgment lien arises whether entered by consent, confession, default, or after litigation. 20 P.L.E. Judgments §362, at 499-500 (1959). See Lauffer v. Cavett, 87 Pa. 479 (1878)(confessed judgment gives rise to a judgment lien). Moreover, the lien arises only upon entry of the judgment. See In re Fortesque, 122 F. Supp. 883 (E. D. Pa. 1954); In re Fell, 18 F. Supp. 986 (E.D. Pa. 1937). Thus, DPW's regulations recognize that entry of judgment by confession

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1/ Reimbursement suits are brought against recipients who have failed to sign confession of judgment agreements, see 55 Pa. Code §257.24(i)(4)(i)(A), and when reimbursement is sought from personal property. See Shearer v. Moore, 277 Pa. Super. 70, 419 A.2d 665 (1980).

yields the very same judgment lien as would result from the successful completion of a lawsuit against the recipient. 55 Pa. Code §§257.24(b)(1)(i); 257.24(i)(4)(i)(A).

Since DPW's liens arose from the entry of confessed judgments, every Pennsylvania bankruptcy court to consider the issue, (as well as the District Court below in this case), has quickly concluded that these liens are judicial liens within the meaning of the Code. In re Esser, 20 B.R. 178 (Bky. E.D. Pa. 1982); In re Hiles, 19 B.R. 856 (Bky. W.D. Pa. 1982); In re Hoffa, 17 B.R. 699 (Bky. E.D. Pa. 1982); In re Taylor, 17 B.R. 586 (Bky. W.D. Pa. 1982); In re Graham, 15 B.R. 1010 (Bky. E.D. Pa. 1981); In re McKay, 15 B.R. 1013 (Bky. E.D. Pa. 1981); In re Galbraith, 15 B.R. 549 (Bky. E.D. Pa. 1981); In re DiRoderico, 17 B.R. 70 (Bky. W.D. Pa. 1981); In re Griggs, 12 B.R. 443 (Bky. E.D. Pa. 1981); In re Waite, 11 B.R. 608 (Bky. M.D. Pa. 1981); In re Holt, 11 B.R. 797 (Bky. W.D. Pa. 1981).

Respondent is not aware of any case outside of Pennsylvania which discusses the avoidability of a welfare lien. There seem to be two reasons for this absence. First, the vast majority of states do not take reimbursement liens upon the property of welfare recipients. Second, those states that do take such a lien, such as New York and Connecticut, do so by mortgage rather than by confessed judgment. See, e.g., Hedge v. Department of Social Services of Nassau County, 62 Misc. 2d 834 (Sup. Ct. N.Y. 1970) (construing N.Y. Social Service Law §106). Since a mortgage is

not a judgment lien, the issue presented in this lawsuit does not arise.[2/]

Therefore, given the limited applicability of this bankruptcy question outside of Pennsylvania and the uniformity of decision reached by the lower courts, this Court should not grant certiorari on this question.

B. THE COURT OF APPEALS' CONCLUSION THAT CONGRESS INTENDED AND HAS AUTHORITY TO PROVIDE FOR THE AVOIDANCE OF JUDICIAL LIENS HELD BY GOVERNMENTAL CREDITORS IS CONSISTENT WITH THE DECISIONS OF THE OTHER COURTS OF APPEALS AND THE DECISIONS OF THIS COURT.

DPW has also requested that this Court review the second prong of the Court of Appeals' decision — that Congress intended to and has the authority to subject states to the lien avoidance procedures of §522(f). Again, this Court should decline the invitation to review this holding because it is consistent with the decisions of this Court as well as of other Courts of Appeals and is therefore insubstantial.

The Court of Appeals concluded that Congress intended to include governmental creditors within the purview of §522(f) by examining the provisions of section 106(c)[3/] of the Code, the

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2/ In other jurisdictions, which permit the entry of a judgment by confession, bankruptcy courts have held that the lien that arises from the entry of judgment is a judicial lien. See In re Tarrant, 19 B.R. 360 (Bky. D. Alaska 1982); In re Pitre, 11 B.R. 777 (Bky. N.D. Ill. 1981).

3/ Section 106(c) states:

(c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity — (cont. on p. 8)

relevant legislative history, and other Code provisions. The Court of Appeals first looked to §106(c) for in that section Congress specifically addressed the waiver of states' immunity.

Congress provided in §106(c) that any Bankruptcy Code provision applicable to nongovernmental creditors is equally applicable to governmental creditors, notwithstanding any assertions of immunity. The appropriate inquiry, therefore, is whether the substantive Code provision binds private creditors. If so, it binds governmental creditors as well.

There is no doubt, and DPW does not dispute, that the Code's judicial lien avoidance provision, 11 U.S.C. §522(f), applies to nongovernmental creditors. However, DPW asserts that the Court of Appeals erred and that Congress did not intend to subject the states to suit or avoid liens held by governmental creditors because 11 U.S.C. §522(f) lacks a specific reference to creditors or governmental creditors. In so arguing, DPW overlooks an abundance of evidence which supports the Court of Appeals' conclusion.

First, the legislative history confirms that Congress intended to subject all governmental creditors to lien avoidance proceedings under 11 U.S.C. §522(f):

3/ Continued

(1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and

(2) a determination by the court of an issue arising under such a provision binds governmental units.

> Section 106(c) codifies in re Gwilliam, 519 F.2d 407 (9th Cir. 1975), and in re Dolard, 519 F.2d 282 (9th Cir. 1975), permitting the bankruptcy court to determine the amount and dischargeability of tax liabilities owing by the debtor or the estate prior to or during a bankruptcy case whether or not the governmental unit to which such taxes are owed files a proof of claim.... [S]ubsection (c) is not limited to those issues, but permits the bankruptcy court to bind governmental units on other matters as well. For example, section 106(c) permits a trustee or debtor in possession to assert avoiding powers under title 11 against a governmental unit....4/ (Emphasis added)

124 CONG. REC. S 17407 (daily ed. Oct. 6, 1978)(remarks of Sen. DeConcini); 124 CONG. REC. H 11091 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards).

Second, while section 522(f) does not mention the word "creditor," the absence of that word is the sole result of drafting style since that section focuses on the interest of the debtor to be protected without regard to the entity holding the interest. When Congress stated that the debtor "may avoid the fixing of a lien," it could only be referring to a lien held by a "creditor" of the debtor. Thus, the term "creditor" is implied in section 522(f). To argue otherwise, as DPW does, produces the following conflict within the Code which Congress could not have intended.

4/ The debtor in possession for these purposes is equivalent to the debtor. See 11 U.S.C. §1101(1).

Under section 522(e)[5] any waiver of exemption, or of the right to avoid liens impairing exemptions, is unenforceable. This provision expressly uses the word "creditor" and by virtue of section 106(c) therefore applies to governmental and nongovernmental creditors. It would make no sense for Congress to forbid a governmental creditor from obtaining from the debtor a waiver of the debtor's right to avoid a lien impairing his exemptions unless the debtor could also avoid such lien.

Thus, given the purpose of section 106(c), its legislative history, and the need to construe a statute so as to give effect to congressional intent, see, Philbrook v. Glodgett, 421 U.S. 707 (1975), the Court of Appeals properly concluded that Congress intended to bring governmental creditors within the reach of section 522(f). See Hutto v. Finney, 473 U.S. 678 (1978).

While no other Circuit Court of Appeals has had occasion to reach the very issue presented by this lawsuit, two other Courts of Appeals have interpreted 11 U.S.C. §106(c) in a manner completely consistent with the decision below. The discharge

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5/ Section 522(e) provides:

> A waiver of exemptions executed in favor of a creditor that holds an unsecured claim against the debtor is unenforceable in a case under this title with respect to such claim against property that the debtor may exempt under subsection (b) of this section. A waiver by the debtor of a power under subsection (f) or (h) of this section to avoid a transfer, under subsection (g) or (i) of this section to exempt property, or under subsection (i) of this section to recover property or to preserve a transfer, is unenforceable in a case under this title.

provisions of 11 U.S.C. §524, like section 522(f), lack any specific reference to creditors. Yet both the Second Circuit and Seventh Circuit have not hesitated to hold that Congress intended to bind all creditors, both governmental and private creditors, to the provisions of section 524. In re Neavear, 674 F.2d 1201 (7th Cir. 1982); In re Glidden, 653 F.2d 85 (2d Cir. 1981).

Since only the Third Circuit Court of Appeals has reached the question of the applicability of section 522(f) to governmental creditors, and has decided that issue consistent with the interpretation of section 106(c) provided by the only other Circuit Courts to interpret that statutory provision, this Court should deny petitioner's request for certiorari on the question.

Finally, DPW also questions whether Congress has the power, consistent with the Eleventh Amendment, to subject states to lien avoidance proceedings in bankruptcy court. Certainly, the power of Congress to abrograte state immunity, at least in certain circumstances, cannot be questioned any longer. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Parden v. Terminal Railway of Alabama State Docks Department, 377 U.S. 184 (1964). In providing for lien avoidance proceedings, Congress has acted under its plenary bankruptcy power pursuant to article I, section 8 of the Constitution. This Court and every Circuit Court which has considered the issue have recognized that Congress may establish a federal cause of action against the states with enforcement in

federal court when acting pursuant to its power under Article I, section 8. See Parden v. Terminal Railway of Alabama State Docks Department, supra; Peel v. Florida Department of Transportation, 600 F. 2d 1070 (5th Cir. 1979); Jennings v. Illinois Office of Education, 589 F.2d 935 (7th Cir.), cert. denied, 441 U.S. 967 (1979). See generally, Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States, 126 U. Pa. L. Rev. 1203 (1978); Tribe, Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues in Controversies About Federalism, 89 Harv. L. Rev. 682 (1976).

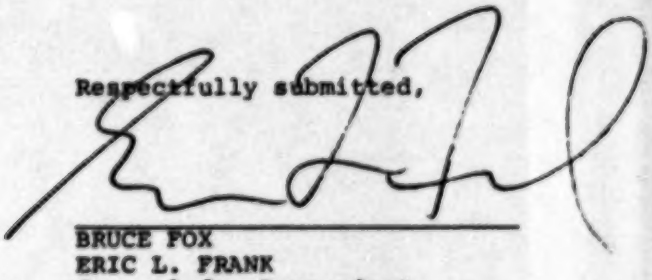
This Court has already held that Congress has authority to grant a Bankruptcy Court jurisdiction to determine the validity of state held liens in bankruptcy proceedings. Gardner v. State of New Jersey, 329 U.S. 565 (1946); Van Huffel v. Harkelrode, 284 U.S. 225 (1931). Thus, the question raised by DPW is insubstantial and does not merit this Court's review.

III.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari in this case should be denied.

Respectfully submitted,



BRUCE FOX
ERIC L. FRANK
Counsel for Respondent

Community Legal Services, Inc.
Law Center Northeast
3156 Kensington Avenue
Philadelphia, PA 19134-2483
(215) 427-4850

DATED: November 12, 1982

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Respondent.

AFFIDAVIT OF SERVICE

I, BRUCE FOX, ESQUIRE, being duly sworn according to law hereby state that I am a member of the bar of the Supreme Court and that on this date completed copies of Respondent's Motion to Proceed in Forma Pauperis and Respondent's Brief in Opposition to Petition for Writ of Certiorari were forwarded by First Class Mail, Postage Prepaid as follows:

10 copies to: Alexander L. Stevas, Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, DC 20543

2 copies to: Jason W. Mann, Esquire
Jonathan Vipond, III, Esquire
Counsel for Petitioner
Office of Legal Counsel
Department of Public Welfare
Room 323 Health & Welfare Bldg.
Harrisburg, PA 17120

2 copies to: Solicitor General
Department of Justice
Washington, DC 20530

2 copies to: Judith K. Giltenboth, Esquire
Assistant United States Attorney
633 U. S. Post Office & Courthouse
Seventh Avenue & Grant Streets
Pittsburgh, PA 15219

To my knowledge, the mailing took place on this date within the permitted time.

Nov. 12 1982
DATED

Bruce Fox
BRUCE FOX

Sworn to and Subscribed
before me this 12th
day of November 1982.

Frances E. Conwill
Notary Public

FRANCES E. CONWILL
Notary Public, Phila., Phila. Co.
My Commission Expires March 6, 1985

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

BRUCE FOX
ERIC L. FRANK
Counsel for Respondent

COMMUNITY LEGAL SERVICES, INC.
LAW CENTER NORTHEAST
3156 Kensington Avenue
Philadelphia, PA 19134
(215) 427-4850

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Respondent.

RESPONDENT'S MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

The Petitioner, Donald Eugene Gardner, asks leave to file the attached Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit and to proceed in forma pauperis pursuant to Rule 46.

Petitioner, as appellee in the courts below, did not seek leave to proceed in forma pauperis in the District Court, or in the Court of Appeals.

The Petitioner's affidavit in support of this Motion is attached hereto.

BRUCE FOX
ERIC L. FRANK
Attorneys for Petitioner

COMMUNITY LEGAL SERVICES, INC.
LAW CENTER NORTHEAST
3156 Kensington Avenue
Philadelphia, PA 19134
(215) 427-4850

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Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Donald Eugene Gardner, being duly sworn, deposes and says that I am the Respondent in the above-entitled case; that in support of my motion to proceed in forma pauperis I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting this petition are true.

1. Are you presently employed?

No. I was last employed in 1974, earning $600.00 per month.

2. Have you received within the past 12 months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source?

My sole income is derived from Social Security Disability.

3. Do you own any cash or checking or savings account?

No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

David Alan Gardner, son, age 13

I UNDERSTAND THAT A FALSE STATEMENT OR ANSWER TO ANY QUESTIONS IN THIS AFFIDAVIT WILL SUBJECT ME TO PENALTIES FOR PERJURY.

Donald Eugene Gardner

DONALD EUGENE GARDNER

Sworn to and subscribed before me this 1st day of Nov 1982

Lois W. Lobb

LOIS W. LOBB, NOTARY PUBLIC
HOUTZDALE BORO, CLEARFIELD COUNTY
MY COMMISSION EXPIRES JULY 14, 1984
Member, Pennsylvania Association of Notaries